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Supreme Court of the United States

OCTOBER TERM, 1948

No. 263

SHULIM WIXMAN, ALSO KNOWN AS
SAMUEL MORRIS WIXMAN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES

A. L. WIRIN,
FRED OKRAND,
LEO GALLAGHER,
HERBERT GANAHL,
NANETTE DEMBITZ,
Counsel for Petitioner.

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We oppose Respondent's suggestion as to the proper disposition of this case, on the following grounds:

1. Assuming *arguendo* the desirability of a remand of the cause to the District Court for its further consideration, the procedure adopted in *Fogel* v. *United States* (cited in Respondent's memorandum, p. 16) is entirely inadequate to meet the needs of the instant case. For we believe it impossible for the District Court to derive sufficient guidance from a short-hand formula such as that

suggested by Respondent (id.). Thus, the expression "economic collectivism" in the suggested formula has not been used by the Courts herein, or by any other Court to our knowledge, and has no fixed or generally accepted meaning which the District Court can be assumed to accept. Further, Respondent assumes that there is a general and well-known standard for categorizing beliefs as "economic" or "political", and its suggestion seems primarily premised on the clarity of this dichotomy; however, the lower Courts herein have indicated no recognition of any such classifications.

It would seem that petitioner's struggle through the Courts, and a grant of the instant petition for certiorari, would be rendered largely useless if the grant only resulted in a re-commencement of the litigation with the correction of the District Court's past errors left to depend on its diligence and ingenuity in ascertaining this Court's intention. It is also to be observed that the guidance to be derived for other naturalization cases from a grant of the instant petition,[1] which is one of the customary purposes and values of a grant of certiorari in such a case, would be almost wholly sacrificed by the procedure Respondent suggests. In short, we do not see that Respondent's partial agreement with petitioner's attack on the judgments herein has abrogated the necessity for this Court's exercise of the adjudicatory function which it would customarily perform in a case of this type.[2]

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[1] See cases cited in Respondent's memorandum (p. 9) in which there have been lower Court holdings similar to that here involved.

[2] See *Marino* v. *Ragen*, 332 U. S. 561, for an example of the many cases, particularly in the field of public law, in which this Court has deemed it appropriate to promulgate opinions although it adopted the result proposed in a confession of error.

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2. As to the group of beliefs which Respondent suggests should be considered by the District Court upon remand and which have been categorized by the litigants as "political", it is peculiarly appropriate for this Court to lay down standards as to this aspect of the case upon the present petition, even if it does not, as suggested in our Petition (and see paragraph 4, infra), make a complete and final determination of petitioner's right to citizenship. It is clear and uncontrovertible on the record that there is a very limited number of "political" beliefs which petitioner could conceivably have held and which could conceivably be deemed to show a lack of attachment to the principles of the Constitution; and there is a precise equivalence of evidence respecting the inference that petitioner held each of these beliefs.[3] Thus, there is no question here of this Court's laying down standards as to speculative matters or hypothetical evidence; but, assuming the remand Respondent requests, we are suggesting merely that this Court state which, if any, of these beliefs could be deemed to show a lack of attachment. Thus a final and correct disposition of the case by the District Court would be insured. In Respondent's memorandum (p. 12) it has designated that one of the possible political beliefs which it considers would show a lack of attachment. Such a statement is not of course binding upon Respondent and thus will be of no aid in clarification of

[3] The only evidence relating directly to petitioner's holding any political beliefs which might conceivably show a lack of attachment was his 1934-5 lecture in which he outlined the theory as to the possible political changes in a transition from capitalism to socialism (Resp. mem., p. 11). No greater emphasis was placed upon one of these possible changes than another, and if the testimony as to petitioner's reputation as a "Red" is to be given any weight, it could not possibly be deemed to show he believed in one of these changes more than another.

the issues or in their expeditious determination if the case is remanded. But Respondent's discussion is noteworthy, we believe, because it illustrates the degree to which this record facilitates the laying down of standards by this Court to guide the District Court upon a remand.[4]

3. We oppose, and urge that we be permitted to be heard upon, Respondent's argument that its suggested order is appropriate in order to give the District Court an opportunity to take further evidence exploratory of petitioner's loyalty (Resp. mem., p. 14). The District Court hearing was not conducted, nor did Respondent limit its evidence nor limit its questioning of petitioner and his witnesses, on the basis of the erroneous view of the statutory standard of attachment thereafter employed by the District Judge. Rather, Respondent energetically and fully developed evidence as to all economic, political, social, and even religious views, and as to all personal, professional, and familial activity, which could possibly show petitioner to be subversive.[5] There is no justification under customary standards of fair procedure for further evidence to be introduced, and a re-opening of the hearing would only unjustifiably postpone the determination of petitioner's right to naturalization.

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[4] It may be noted that in the well-reasoned opinion in *Stasiukevich* v. *Nicolls*, 168 F. 2d 474 (C. C. A. 1), on which Respondent places much reliance, the Court delivered a detailed analysis of the standards to be used by the District Court upon remand in appraising the evidence.

[5] We shall not again remark on the paltry testimony, mentioned in note 5 of Respondent's memorandum, upon which it partially predicates the assumption that there is room for further investigation of petitioner. We believe a brief perusal of this testimony will establish more expeditiously than analysis of counsel that the investigation already made was unnecessary rather than that its termination is a cause for regret. See the *Stasiukevich* opinion,

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4. We shall not here attempt to argue our view that this Court should direct the grant of naturalization rather than remand this cause for further consideration by the District Court. While we believe that such a direction would be appropriate, our position on this aspect of the case can be elucidated only by a detailed consideration of the findings and the evidence. Because our petition, we submit, discloses that there is a substantial basis for our contention, and because of the importance to the petitioner of avoiding an unnecessary prolongation of the litigation, we urge that our opportunity to present to this Court the argument for a directed grant of naturalization should not be foreclosed by the type of order suggested by Respondent.

Dated: December 2, 1948.

Respectfully submitted,

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stating that reports of an alien's reputation as a "Communist" is "hearsay of a particularly unreliable sort" (168 F. 2d at p. 479). As to the reference to petitioner's membership in the "League Against War and Fascism" (Resp. mem., note 5), it seems to us the grossest example of reliance on "guilt by association" to even refer to such membership in a case such as the instant one where petitioner's questioning extends over 56 record pages, where precise documentary evidence of his beliefs was introduced, and where 39 other witnesses appeared.

With respect to the precision and amount of evidence describing the alien's beliefs, there is no analogy between this case and *Stasiukevich*.